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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	Rulemaking 06-04-009 (Filed April 13, 2006)

RESPONSE OF THE NATURAL RESOURCES DEFENSE COUNCIL (NRDC) TO APPLICATIONS FOR REHEARING OF DECISION 07-01-039, "INTERIM OPINION ON PHASE 1 ISSUES: GREENHOUSE GAS EMISSIONS PERFORMANCE STANDARD"

March 13, 2007

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning.	Rulemaking 04-04-003 (Filed April 1, 2004)

RESPONSE OF THE NATURAL RESOURCES DEFENSE COUNCIL (NRDC) TO APPLICATIONS FOR REHEARING OF DECISION 07-01-039, "INTERIM OPINION ON PHASE 1 ISSUES: GREENHOUSE GAS EMISSIONS PERFORMANCE STANDARD"

1. Introduction and Summary

In accordance with Rule 16.1 of the California Public Utilities Commission's (CPUC or Commission) Rules of Practice and Procedure, the Natural Resources Defense Council (NRDC) respectfully submits the following response to the applications for rehearing of Decision (D.) 07-01-039 (Decision) filed by the Community Environmental Council (CE Council) (on February 22, 2007), the Center for Energy and Economic Development (CEED)[1] (on February 23, 2007), and Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC) (on February 26, 2007). In accordance with Rule 16.1(d), which states that a response to applications for rehearing "may be filed 15 days after the last application for rehearing was filed;" thus, this response is timely filed. NRDC is a non-profit membership organization with a long-standing interest in minimizing the societal costs of the reliable energy services that Californians demand.

CEED, CE Council, and CAC/EPUC's applications for rehearing of D.06-02-032 do not bring to light any legal error in the Decision, and we urge the Commission to reject these applications. The Decision establishes the implementation rules for a

[1] CEED also filed a concurrent Motion to Intervene in this proceeding. We respond here to their application for rehearing in the case that the Commission grants their motion.

greenhouse gas (GHG) emissions performance standard (EPS), as directed by Senate Bill (SB) 1368, which was signed by Governor Schwarzenegger on September 29, 2006.

CEED's application does not identify any legal error in the Decision, and simply repeats several arguments it made previously in this proceeding prior to the adoption of the Decision. CEED is misguided in its contentions that the Decision violates the Commerce Clause, that the Decision fails to meet stated design goals for the EPS, and that the Commission's adoption of the EPS conflicts with federal climate change policy and regulation. Similarly, CE Council's argument that SB 1368 requires the Commission's EPS to account for the net lifecycle emissions of the fuels used to generate electricity is without merit. In addition, CAC/EPUC's argument that the Decision does not properly address the calculation of emissions from bottoming-cycle cogeneration facilities is incorrect. While the Commission has already correctly rejected all of these arguments in its Decision, we address each of these issues in turn.

2. CEED's application does not introduce any new arguments not already addressed by the Decision.

CEED's Application for Rehearing does not bring up any new information or point out any legal errors in the Commission's Decision. "The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[2] CEED has already brought its legal arguments to the Commission's attention on several previous occasions.[3] The Commission has already correctly rejected CEED's legal contentions in the Decision, and CEED's application for rehearing does not present any reason for the Commission to change its decision.

3. CEED's argument that the Decision violates the Commerce Clause of the U.S. Constitution is without merit. The Decision does not directly regulate out-of-state parties and is geographically neutral.

[2] California Public Utility Commission Rules of Practice and Procedure, Rule 16.1(c)
[3] *See* CEED Opening Brief, filed June 30, 2006; CEED Reply Brief, filed July 11, 2006; CEED Comments on Draft Workshop Report, filed September 8, 2006; CEED Opening Comments on Final Workshop Report, filed October 18, 2006; CEED Comments on Proposed Decision, filed January 2, 2007.

The Decision can not be considered extraterritorial regulation, as CEED claims, because it does not affect "commerce that takes place wholly outside of the State's borders."[4] As the Decision points out, it is only laws that *directly* regulate out-of-state parties that are forbidden, while laws that *affect* interstate contracts are permissible.[5] States retain the authority to regulate matters of local concern "even though interstate commerce may be affected.[6] The case law distinguishes between regulation and the effects of regulation: "legislation may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."[7] The Commission is regulating California transactions conducted by California load-serving entities providing power to California consumers. The fact that these transactions might also affect parties outside of California does not cause the Decision to rise to the level of a Commerce Clause violation.

The Standard complies with Ninth Circuit precedent on this issue. The Ninth Circuit held that a San Francisco ordinance that applied to out-of-state companies who have direct contact with San Francisco and contract with San Francisco was not extraterritorial regulation.[8] Similarly, the EPS will only affect generators who sign long-term contracts in California to supply electricity in California. This is not extraterritorial regulation, and is not prohibited by the Commerce Clause.

In addition, the Decision is completely geographically neutral, with neither the purpose nor the effect of favoring California power plants over non-California power plants. All generators entering into long-term contracts in California with California load-serving entities will have to meet the same standard. CEED itself points out that all of the cases it cites in support of its Commerce Clause argument were examples of "discrimination…based on geographic origin."[9] This is in stark contrast with the

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[4] *See Edgar v. MITE Corp*., (1982) 457 U.S. 624, 642-42.
[5] *See* Decision, 218; *Gravquick A/S v. Trimble Navigation International Ltd*. (9th Cir. 2003) 323 F.3d 1219, 1224.
[6] *Maine v. Taylor* (1986) 477 U.S. 131, 138; see also Hunt v. Washington Apple Advertising Comm'n (1977) 432 U.S. 333, 350 (quoting *Southern Pacific Co. v. Arizona, ex rel. Sullivan* (1945) 325 U.S. 761, 767) ("there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.").
[7] *District of Columbia v. Beretta U.S.A. Corp*., (D.C. Cir. 2005) 872 A.2d 633,656.
[8] *S.D. Myers, Inc. v. City and County of San Francisco*, (9th Cir. 2001) 253 F.3d 461, 469.
[9] CEED App., 8.

emissions performance standard (EPS) at issue, which only discriminates based on GHG emissions, with no reference to the geographic origin of those emissions.

4. CEED's argument ignores the fact that SB 1368 mandates an EPS with the core goal of protecting Californians from financial and reliability risk.

Although the Commission began consideration of an EPS before SB 1368 was signed into law, the overriding drive behind the Decision is one of statutory compliance. SB 1368 requires the Commission to establish a GHG EPS.[10] The purpose of this requirement is to protect California consumers from financial risk and potential exposure to reliability problems associated with future investments in GHG-intensive generating technologies.[11] CEED's argument that the Decision fails to meet design goals ignores this broader statutory context. In addition, the research on which CEED relies has already been disputed by the Division of Ratepayer Advocates.[12]

5. CEED's argument that the Decision conflicts with federal climate change policy and regulation is misguided.

CEED's argument that present state action will weaken a possible future federal response to global warming is misguided. CEED pointedly ignores the Sense of the Senate resolution passed in 2005 calling for mandatory limits on GHG emissions. It also ignores the fact that there are now several federal bills on global climate change pending in Congress.[13] Finally, it ignores the express statements by federal officials, noted in the Decision, lauding state and local actions that will contribute to the national goal of reducing greenhouse gas intensity.[14] The EPS contributes to this stated national goal, and also provides protection for California consumers in the likely event that federal legislation on climate change is enacted. This protection from financial risk is an express purpose of the underlying statutory mandate, and of the Decision.[15]

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[10] PUBLIC UTILITIES CODE § 8341(d)(1).
[11] *Id.* at § 8342(i)&(j); *See* Decision, 3.
[12] *See* Division of Ratepayer Advocates' Written Reply to the Supplemental Material of the Center on Energy and Economic Development, Nov. 1, 2006.
[13] *Global Warming Bills Heat Up In Congress*, Chicago Tribune, March 7, 2007
[14] *See* Decision, 194.
[15] PUBLIC UTILITIES CODE § 8342(i)&(j); *See* Decision, 3.

6. CE Council's argument that SB 1368 requires the Commission's EPS to account for the net lifecycle emissions of the fuels used to generate electricity is without merit.

CE Council argues that SB 1368, by directing the inclusion of "net emissions" in determining the GHG emissions rate, requires consideration of lifecycle (upstream) net emissions of all fuel sources for baseload electricity generation. However, SB 1368 is clear that "In determining the rate of emissions of greenhouse gases for baseload generation, the commission shall include the net emissions resulting from the *production of electricity* by the *baseload generation*."[16] (emphasis added) "Baseload generation" is defined by statute to be "electricity generation from a powerplant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent," and "powerplant" is defined as "a facility for the generation of electricity, and includes one or more generating units at the same location."[17] The only context in which fuel source emissions are directed to be accounted is the "process of growing, processing, and generating the electricity from the fuel source" for biomass, biogas, or landfill gas energy.[18] Thus, the EPS laid out in SB 1368 and the Decision is intended to apply to the emissions of powerplants that generate electricity, and only emissions from the facility itself are to be considered, not including upstream emissions from fuel sources.

7. CAC/EPUC's arguments regarding bottoming-cycle cogeneration facilities have already been addressed by the Decision.

CAC/EPUC argue that the FERC definition of "useful thermal energy output" does not apply to bottoming-cycle cogeneration and so claim that no thermal energy would be included for these facilities in the cogeneration conversion methodology adopted by the decision. However, the Commission has already addressed this issue; after listing the definition of "useful thermal energy output" in the context of topping-cycle cogeneration facilities, the Decision also points out that FERC regulations also address "useful thermal energy" for bottoming-cycle cogeneration.[19] The Decision goes

[16] Public Utilities Code 8341(d)(2).
[17] Public Utilities Code 8340(a) and 8340(m).
[18] Public Utilities Code 8341(d)(4).
[19] See Decision, 112.

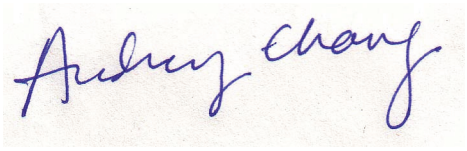
on to direct that this useful thermal energy produced for industrial processes in bottom-cycle cogeneration should be accounted for both in the numerator (total emissions should reflect total fuel used for both the industrial process as well as any supplemental firing) and denominator (thermal energy used for the industrial process) of the conversion method formula.[20] Thus, CAC/EPUC have not identified any error in the Decision. The Commission should reject CAC/EPUC's request to delete or modify Findings of Fact 88, 90, 112, and 113.

8. Conclusion

The arguments presented in CEED, CE Council, and CAC/EPUC's applications for rehearing of D.07-01-039 are without merit. NRDC respectfully urges the Commission to reject these applications for rehearing.

Dated: March 13, 2007

Respectfully submitted,



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[20] See Decision, 113-114 and 245 (Finding of Fact 113); Adopted Rules (Attachment 7, p. 6).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the **"Response of the Natural Resources Defense Council (NRDC) to Applications for Rehearing of Decision 07-01-039" in the matter of R.06-04-009** to all known parties of record in this proceeding by delivering a copy via email or by mailing a copy properly addressed with first class postage prepaid.

Executed on March 13, 2007 at San Francisco, California.

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